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15 **UNITED STATES DISTRICT COURT**
16 **SOUTHERN DISTRICT OF CALIFORNIA**

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| <p>17 Sahar Maleksaeedi, Individually 18 and on Behalf of All Others 19 Similarly Situated,</p> <p>20 21 Plaintiffs,</p> <p>22 v.</p> <p>23 American Express Centurion 24 Bank,</p> <p>25 26 Defendant.</p> | <p>27 Case No.: '11CV0790 JAH CAB</p> <p>28 <u>CLASS ACTION</u></p> <p>Complaint for Damages and Injunctive Relief Pursuant To The Telephone Consumer Protection Act, 47 U.S.C § 227 et seq.</p> <p>Jury Trial Demanded</p> |
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INTRODUCTION

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2 1. Sahar Maleksaeed (“Plaintiff”) brings this First Amended Class Action
3 Complaint for damages, injunctive relief, and any other available legal or
4 equitable remedies, resulting from the illegal actions of American Express
5 Centurion Bank (“Defendant”), in negligently, and/or willfully contacting
6 Plaintiff on Plaintiff’s cellular telephone, in violation of the Telephone
7 Consumer Protection Act, 47 U.S.C. § 227 et seq., (“TCPA”), thereby
8 invading Plaintiff’s privacy. Plaintiff alleges as follows upon personal
9 knowledge as to himself and his own acts and experiences, and, as to all other
10 matters, upon information and belief, including investigation conducted by his
11 attorneys.

JURISDICTION AND VENUE

12
13 2. Jurisdiction is proper under 28 U.S.C. § 1332(d)(2) because Plaintiff seeks up
14 to \$1,500 in damages for each call in violation of the TCPA, which, when
15 aggregated among a proposed class number in the tens of thousands, exceeds
16 the \$5,000,000 threshold for federal court jurisdiction. Further, Plaintiff
17 alleges a national class, which will result in at least one class member
18 belonging to a different state than that of Defendant, providing jurisdiction
19 under 28 U.S.C. Section 1332(d)(2)(A). Therefore, both elements of diversity
20 jurisdiction under the Class Action Fairness Act of 2005 (“CAFA”) are
21 present, and this Court has jurisdiction.

22 3. Venue is proper in the United States District Court for the Southern District of
23 California pursuant to 18 U.S.C. § 1391(b) and 1441(a) because the events
24 giving rise to Plaintiff’s causes of action against Defendant occurred within
25 the State of California and the County of San Diego, within this judicial
26 district.

PARTIES

1
2 4. Plaintiff is, and at all times mentioned herein was, a citizen and resident of the
3 State of California. Plaintiff is, and at all times mentioned herein was, a
4 “person” as defined by 47 U.S.C. § 153 (10).

5 5. Plaintiff is informed and believed, and thereon alleges, that Defendant is, and
6 at all times mentioned herein was, a corporation whose primary corporate
7 address is in New York, New York. Defendant, is a citizen of this state.
8 Defendant is, and at all times mentioned herein was, a corporation and a
9 “person,” as defined by 47 U.S.C. § 153 (10). Defendant provides unsecured
10 credit cards to thousands, if not hundreds of thousands of consumers.
11 Plaintiff alleges that at all times relevant herein Defendant conducted business
12 in the State of California and in the County of San Diego, and within this
13 judicial district.

FACTUAL ALLEGATIONS

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15 6. At all times relevant, Plaintiff was a citizen of the State of California.
16 Plaintiff is, and at all times mentioned herein was, a “person” as defined by 47
17 U.S.C. § 153 (10).

18 7. Defendant is, and at all times mentioned herein was, a corporation and a
19 “person,” as defined by 47 U.S.C. § 153 (10).

20 8. At all times relevant Defendant conducted business in the State of California
21 and in the County of San Diego, within this judicial district.

22 9. Plaintiff has an American Express Credit card for a long period of time.

23 10. Plaintiff activated one or more options on her American Express, account on
24 line to receive notifications concerning his account via text messages on April
25 6, 2011.

26 11. Plaintiff continued to receive text message notifications from Defendant for a
27 period of time, at which time she no longer wanted to receive text message
28 notifications on her cellular telephone from Defendant.

1 12. Plaintiff then responded to Defendant’s last text message notification by
2 replying “stop.”

3 13. At this point, Plaintiff withdrew any type of express or implied consent to
4 receive text message notification to his cellular telephone.

5 14. In response to receiving this revocation of consent, Defendant then
6 immediately sent another, unsolicited, confirmatory text message to Plaintiff’s
7 cellular telephone.

8 15. This unsolicited text message placed to Plaintiff’s cellular telephone was
9 placed via an “automatic telephone dialing system,” (“ATDS”) as defined by
10 47 U.S.C. § 227 (a)(1) as prohibited by 47 U.S.C. § 227 (b)(1)(A).

11 16. The telephone number that the defendant, or its agents, called was assigned to
12 a cellular telephone service for which Plaintiff incurs a charge for incoming
13 calls pursuant to 47 U.S.C. § 227 (b)(1).

14 17. These telephone calls constituted calls that were not for emergency purposes
15 as defined by 47 U.S.C. § 227 (b)(1)(A)(i).

16 18. Plaintiff did not provide Defendant or its agents prior express consent to
17 receive unsolicited text messages, pursuant to 47 U.S.C. § 227 (b)(1)(A).

18 19. These telephone calls by Defendant or its agents violated 47 U.S.C. § 227(b)
19 (1).

20 **CLASS ACTION ALLEGATIONS**

21 20. Plaintiff brings this action on behalf of himself and on behalf of and all others
22 similarly situated (“the Class”).

23 21. Plaintiff represents, and is a member of the Class, consisting of all persons
24 within the United States who received any unsolicited confirmatory text
25 messages and/or any other unsolicited text messages from Defendant after
26 any class member sent a reply text message, “stop,” to Defendant in response
27 to a text message sent by Defendant, which text message was not made for
28

1 emergency purposes or with the recipient's prior express consent, within the
2 four years prior to the filing of this Complaint.

3 22. Defendant and its employees or agents are excluded from the Class. Plaintiff
4 does not know the number of members in the Class, but believes the Class
5 members number in the hundreds of thousands, if not more. Thus, this matter
6 should be certified as a Class action to assist in the expeditious litigation of
7 this matter.

8 23. Plaintiff and members of the Class were harmed by the acts of Defendant in at
9 least the following ways: Defendant, either directly or through its agents,
10 illegally contacted Plaintiff and the Class members via their cellular
11 telephones by using an unsolicited and/or confirmatory text message, thereby
12 causing Plaintiff and the Class members to incur certain cellular telephone
13 charges or reduce cellular telephone time for which Plaintiff and the Class
14 members previously paid, and invading the privacy of said Plaintiff and the
15 Class members. Plaintiff and the Class members were damaged thereby.

16 24. This suit seeks only damages and injunctive relief for recovery of economic
17 injury on behalf of the Class and it expressly is not intended to request any
18 recovery for personal injury and claims related thereto. Plaintiff reserves the
19 right to expand the Class definition to seek recovery on behalf of additional
20 persons as warranted as facts are learned in further investigation and
21 discovery.

22 25. The joinder of the Class members is impractical and the disposition of their
23 claims in the Class action will provide substantial benefits both to the parties
24 and to the court. The Class can be identified through Defendant's records or
25 Defendant's agents' records.

26 26. There is a well-defined community of interest in the questions of law and fact
27 involved affecting the parties to be represented. The questions of law and fact
28

1 to the Class predominate over questions which may affect individual Class
2 members, including the following:

- 3 a) Whether, within the four years prior to the filing of this Complaint,
4 Defendant placed any confirmatory text messages (other than a text
5 message made for emergency purposes or made with the prior express
6 consent of the called party) to a Class member using any automatic
7 telephone dialing and/or texting system to any telephone number
8 assigned to a cellular telephone service;
- 9 b) Whether Plaintiff and the Class members were damaged thereby, and
10 the extent of damages for such violation; and
- 11 c) Whether Defendant should be enjoined from engaging in such conduct
12 in the future.

13 28. As a person that received at least one confirmatory text message without
14 Plaintiff's prior express consent, Plaintiff is asserting claims that are typical of
15 the Class. Plaintiff will fairly and adequately represent and protect the
16 interests of the Class in that Plaintiff has no interests antagonistic to any
17 member of the Class.

18 29. Plaintiff and the members of the Class have all suffered irreparable harm as a
19 result of the Defendant's unlawful and wrongful conduct. Absent a class
20 action, the Class will continue to face the potential for irreparable harm. In
21 addition, these violations of law will be allowed to proceed without remedy
22 and Defendant will likely continue such illegal conduct. Because of the size
23 of the individual Class member's claims, few, if any, Class members could
24 afford to seek legal redress for the wrongs complained of herein.

25 30. Plaintiff has retained counsel experienced in handling class action claims and
26 claims involving violations of the Telephone Consumer Protection Act.

27 31. A class action is a superior method for the fair and efficient adjudication of
28 this controversy. Class-wide damages are essential to induce Defendant to

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1 comply with federal and California law. The interest of Class members in
2 individually controlling the prosecution of separate claims against Defendant
3 is small because the maximum statutory damages in an individual action for
4 violation of privacy are minimal. Management of these claims is likely to
5 present significantly fewer difficulties than those presented in many class
6 claims.

7 32. Defendant has acted on grounds generally applicable to the Class, thereby
8 making appropriate final injunctive relief and corresponding declaratory relief
9 with respect to the Class as a whole.

10 **FIRST CAUSE OF ACTION**

11 **NEGLIGENT VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT**

12 **47 U.S.C. § 227 ET SEQ.**

13 33. Plaintiff incorporates by reference all of the above paragraphs of this
14 Complaint as though fully stated herein.

15 34. The foregoing acts and omissions of Defendant constitute numerous and
16 multiple negligent violations of the TCPA, including but not limited to each
17 and every one of the above-cited provisions of 47 U.S.C. § 227 et seq.

18 35. As a result of Defendant’s negligent violations of 47 U.S.C. § 227 et seq,
19 Plaintiff and The Class are entitled to an award of \$500.00 in statutory
20 damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).

21 36. Plaintiff and the The Class are also entitled to and seek injunctive relief
22 prohibiting such conduct in the future.

23 **PRAYER FOR RELIEF**

24 **Wherefore,** Plaintiff respectfully requests the Court grant Plaintiff and The Class
25 members the following relief against Defendant:
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**FIRST CAUSE OF ACTION FOR NEGLIGENT VIOLATION OF
THE TCPA, 47 U.S.C. § 227 ET SEQ.**

37. As a result of Defendant’s negligent violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for himself and each Class member \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).

38. Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such conduct in the future.

39. Any other relief the Court may deem just and proper.

TRIAL BY JURY

40. Pursuant to the seventh amendment to the Constitution of the United States of America, Plaintiffs are entitled to, and demand, a trial by jury.

Date: April 7, 2011

HYDE & SWIGART

By: /s Joshua B. Swigart
Joshua B. Swigart
Attorneys for Plaintiff

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Riverside, California

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JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Sahar Maleksaeedi, Individually and on Behalf of All Others
Similarly Situated

(b) County of Residence of First Listed Plaintiff San Diego
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)
Hyde & Swigart
411 Camino Del Rio South Suite 301, San Diego, CA 92108

DEFENDANTS

American Express Centurion Bank

County of Residence of First Listed Defendant New York
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

'11CV0790 JAH CAB

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 3 Federal Question (U.S. Government Not a Party)
- 2 U.S. Government Defendant
- 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

| CONTRACT | TORTS | FORFEITURE/PENALTY | BANKRUPTCY | OTHER STATUTES |
|--|--|---|---|---|
| <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise | PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability | <input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations & Disclosure Act <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions | <input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609 | <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input checked="" type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes |
| REAL PROPERTY | CIVIL RIGHTS | PRISONER PETITIONS | | |
| <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property | <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights | <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition | | |

V. ORIGIN

(Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from another district (specify)
- 6 Multidistrict Litigation
- 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

47 U.S.C. § 227 et seq

Brief description of cause:

ICPA

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE 4/14/11 SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____